

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD E. BUCKLEY,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

CASE NO. C05-1009RSM

ORDER ON DEFENDANTS'
MOTION TO DISMISS

This matter is before the Court for consideration of defendants' Rule 12(b)(1) and 12(b)(6) motion to dismiss, which plaintiff has opposed. For the reasons set forth below, the Court GRANTS defendants' motion.

DISCUSSION

Plaintiff Richard Buckley, appearing *pro se*¹ and *in forma pauperis*, filed this action, designated as a complaint "for tortious invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, [and] defamation." He alleges federal question jurisdiction under 28 U.S.C. § 1331, and also 28 U.S.C. § 1345. The latter statute is inapplicable here because the United States is a party defendant, not the plaintiff in this matter. Plaintiff seeks damages in excess of one million dollars for emotional distress, pain and suffering, lost wages and benefits, medical expenses, and

¹Plaintiff is a member of the California bar and appears on the role of attorneys admitted to practice before this Court.

1 other relief.

2 The complaint alleges that plaintiff, a former Assistant Regional Counsel at the Social Security
3 Administration, was at his home in a men's shelter, the Salvation Army William Booth Center, when two
4 agents of his former employer arrived to question him. He states that one of the agents threatened that
5 they would "do their thing" if he did not submit to questioning. Plaintiff asked a staff member where they
6 could conduct the questioning, and they were referred to the common dining area. Plaintiff states that he
7 led the agents to the dining area, where they sat opposite him blocking his exit, so that he felt threatened.
8 After questioning him for forty or fifty minutes, the agents ordered him not to leave the State of
9 Washington without their permission. They also ordered plaintiff to contact them before visiting the
10 office of the Social Security Administration to pursue his application for disability benefits. Plaintiff
11 alleges, in four separate counts in the complaint, that these acts violated his rights under the Fourth
12 Amendment and the Privacy Act, 5 U.S.C. § 552a, as well as defamed him and caused him emotional
13 distress. He names as defendants special agents Ronald Legan and Joe Rogers, as well as Commissioner
14 of Social Security Jo Anne B. Barnhart, and the Social Security Administration. All are named in their
15 official capacities.²

16 Defendants have moved to dismiss the Fourth Amendment and Privacy Act claims under F.R.Civ.
17 Proc. 12(b)(6) for failure to state a claim, and the tort claims under Rule 12(b)(1) for lack of jurisdiction.
18 The latter will be addressed first.

19 Plaintiff's tort claims of negligent and intentional infliction of emotional distress, and defamation,
20 are all subject to dismissal for plaintiff's failure to comply with the requirements of the Federal Tort
21 Claims Act ("FTCA"), 28 U.S.C. § 2401(b) and § 2671 *et seq.* The statute provides a limited waiver of
22 sovereign immunity in certain tort suits against the United States for damages caused by the negligence of
23 government employees. Defendants correctly assert that a FTCA action must be brought against the

24
25 ²Plaintiff has filed at least six other lawsuits in this Court against his former employer or regarding
26 that employment. *Buckley v. Meis, et al.*, C02-2051TSZ; *Buckley v. Meis, et al.*, C03-007RSL; *Buckley*
27 *v. Schaul, et al.*, C03-3233JCC; *Buckley v. Schaul*, C03-3234TSZ; *Buckley v. Bloch, et al.*, C04-
C03-007RSL; C03-3234TSZ; C04-422TSZ. All have been dismissed.

1 United States alone, not an agency thereof, and they therefore have properly filed a Notice of
2 Substitution, substituting the United States as party defendant on the common law tort claims. Dkt. # 7.
3 The United States has then moved to dismiss these tort claims for plaintiff's failure to comply with the
4 jurisdictional prerequisites to filing suit. 28 U.S.C. § 2675(a). According to the Declaration of John
5 Carlo, plaintiff has not filed an administrative tort claim regarding the incident of which he now
6 complains. In opposing the motion to dismiss, plaintiff has not disputed this assertion. Accordingly, his
7 tort claims (Counts II, III and IV in his complaint) must be dismissed for lack of jurisdiction.

8 Defendants have moved to dismiss plaintiff's Privacy Act and Fourth Amendment claims for
9 failure to state a claim under Rule 12(b)(6). A complaint should not be dismissed for failure to state a
10 claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim
11 which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). As to the Privacy Act
12 claim, this is so; the Privacy Act prohibits (with certain exceptions) the disclosure by an agency of "any
13 record which is contained within a system of records. . ." without the prior consent, in writing, of the
14 individual. 5 U.S.C. § 552a(b). As plaintiff's complaint regarding his interrogation by agents Legan and
15 Rogers is unrelated to records or the disclosure thereof, it fails to state a claim under the Privacy Act.
16 That is, he has stated no facts which, if proven, would entitle him to relief under the Privacy Act. This
17 claim is therefore subject to dismissal for failure to state a claim.

18 As to plaintiff's Fourth Amendment claim, defendants contend that plaintiff invoked 42 U.S.C.
19 § 1983 as the jurisdictional basis for his claim, and that this section is inapplicable to actions by federal
20 agents or officials. However, plaintiff in his opposition to dismissal has asserted a right under *Bivens v.*
21 *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme
22 Court held that a victim of a Fourth Amendment violation committed by federal officers acting under
23 color of state law could bring an action for money damages against the individual officers. *Id.* at 389.
24 Therefore, defendants' argument under 42 U.S.C. § 1983 is unavailing. However, the facts alleged by
25 plaintiff do not state a violation of the Fourth Amendment, which serves to protect "persons, houses,
26 papers, and effects" against unreasonable searches and seizures, so that the claim is subject to dismissal
27

1 on that basis.³

2 A search or seizure conducted without a warrant is, with few exceptions, *per se* unreasonable.
3 *Katz v. United States*, 389 U.S. 347, 357 (1967). Here, however, there was neither search nor seizure.
4 The complaint states that agents Legan and Rogers were admitted to the men's shelter by staff. Plaintiff
5 met them at the front desk and, despite feeling "threatened", voluntarily accompanied them to a public
6 area to answer questions. The agents did not "trespass" as plaintiff alleges, and neither plaintiff nor his
7 living space was searched. Nor was he placed in custody or physically restrained in any way. The facts
8 stated in the complaint, then, no matter how liberally read, do not state claim of Fourth Amendment
9 violation.

10 In opposing the motion to dismiss, plaintiff has argued at length regarding his reasonable
11 expectation of privacy, and his contention that the agents' appearance at the mens' shelter constituted
12 trespass. However, he still has stated no facts that would demonstrate that a search or seizure occurred,
13 and give rise to a claim of Fourth Amendment violation. The claim must be dismissed pursuant to 28
14 U.S.C. § 1915(e) for failure to state a claim.

15 Defendants also contend that the Fourth Amendment claim must be dismissed for lack of
16 jurisdiction, because the agents have been named in their official, not individual capacities as required.
17 Defendants are correct that a suit against a federal officer or agent in his official capacity is a suit against
18 the United States itself, subject to applicable defenses of sovereign immunity. *Kentucky v. Graham*, 473
19 U.S. 159 (1985). However, this pleading defect could be easily cured by amendment, and the Court
20 declines to consider it as a basis for dismissal.

21 Defendants have also moved to dismiss the entire complaint for insufficiency of process and
22 failure to properly serve the summons and complaint. The Court notes that plaintiff is proceeding *in*
23 *forma pauperis*. Pursuant to that statute, the Court, in a standard Order, generally directs the Clerk to
24 issue summons and provide service by mail in accordance with the applicable section of F.R.Civ. Proc. 4
25 (here, Rule 4(i)). 28 U.S.C. § 1915(d). However, before the Court had an opportunity to review the file

26
27 ³As plaintiff is proceeding *in forma pauperis*, the Court may consider this *sua sponte*, and indeed
has an obligation to do so. 28 U.S.C. § 1915(e)(2)(B)(ii).

1 and issue that standard Order in this case, defendant appeared and filed this motion to dismiss, apparently
2 in response to copies of the complaint that had been served by plaintiff himself. The Court ruled that the
3 service error would be corrected should the complaint survive the motion to dismiss. Dkt. # 12.

4 However, the Court declines to consider insufficiency of process as an additional basis for dismissal.

5 Accordingly, defendants' motion to dismiss is GRANTED and the complaint is DISMISSED,
6 without prejudice, pursuant to 28 U.S.C. § 1915(e)(2)(b)(ii), Rule 12(b)(1) and 12 (b)(6), as set forth
7 above.

8
9
10 DATED this 4th day of November, 2005.

11
12
13 

14 RICARDO S. MARTINEZ
15 UNITED STATES DISTRICT JUDGE
16
17
18
19
20
21
22
23
24
25
26
27